SUNKYONG INTERNATIONAL INC.

v.

MALAYSIAN RUBBER DVPT. CORP. BHD.

SUPREME COURT, KUALA LUMPUR
MOHD. YUSOFF MOHAMED SCJ
PEH SWEE CHIN SCJ
EUSOFF CHIN SCJ
[CIVIL APPEAL NO. 03-122 OF 1991]
15 MAY 1992

CIVIL PROCEDURE: *Appellant, a company incorporated in USA - Respondent local company in Malaysia - Breach of contract - Sale of rubber gloves allegedly bought by respondent as agent for appellant - Respondent obtained an order inter alia, (i) to issue 3rd party notice against appellant (ii) to serve 3rd party notice on appellant at New York through agents of respondent - Appellant through local solicitors applied to set aside both orders - Order 11 r. 1 Rules of the High Court 1980 - No averment by respondent how, when and where contract made - Leave to serve out of jurisdiction - No averment in affidavit in its belief, it had a good cause of action - Whether omission amounts to mere failure to comply with rules of Court in regard to form and content - Irregularity - Whether curable by costs without need for amendment - Service - Civil Procedure Convention - Where Civil Procedure Convention does not subsist - Method of service.*

On a summons-in-chambers filed by the respondent and heard *ex parte* before the learned Registrar, the respondent obtained an order (1) that the respondent be at liberty to issue a third party notice against the appellant; (2) that the respondent be at liberty to serve the said third party notice on the appellant at a specified address in New York, USA through the agents of the respondent there; (3) that appearance be entered within 21 days etc. and (4) for costs in the cause.

The appellant through local Solicitors applied to the learned Registrar for the abovementioned order to be set aside. The application was refused. The appellant's appeal to the learned Judge in Chambers was dismissed. The appellant obtained leave to appeal further to the Supreme Court. Hence, this appeal.

Held:

[1] In the instant appeal, it was common ground which was accepted by the Court that in the USA, there did not subsist the Civil Procedure Convention, therefore O. 11 r. 6(2) of the RHC 1980 applied. The service of the notice of writ herein would have to be through Government of the USA or through the Malaysian Consular authority contrary to what was ordered and done in this case, as stated in the order of the High Court;

[2] The order of leave granted to issue the third party notice was upheld but the service out of jurisdiction in question was set aside. Accordingly, part of the learned Registrar's order which provided for service on the appellant by the agents of the respondent ought to be set aside.

[Leave granted to issue third party notice upheld. Registrar's order which provided for service on the appellant by the agents of the respondent was set aside. Appellant awarded half costs of appeal and Court below.]

[Bahasa Malaysia Translation of Headnote]

PROSEDUR SIVIL: *Perayu sebuah syarikat yang diperbadankan di Amerika Syarikat - Responden sebuah syarikat tempatan di Malaysia - Kemungkiran kontrak - Penjualan sarung tangan getah yang dibeli oleh responden sebagai agen bagi perayu - Responden telah memperolehi suatu perintah yang antara lain; (i) untuk mengeluarkan notis pihak ketiga terhadap perayu (ii) untuk menyampaikan notis pihak ketiga keatas perayu di New York melalui agen responden - Perayu telah melalui peguamcara tempatan membuat permohonan untuk mengenepikan kedua-dua perintah - Aturan 11 Kaedah 1 Kaedah-Kaedah Mahkamah Tinggi 1980 - Responden tidak menjelaskan bagaimana, bila dan dimana kontrak telah dibuat - Kebenaran untuk penyampaian luar bidangkuasa - Responden tidak menyatakan dalam afidavit bahawa ianya mempercayai bahawa ia mempunyai kausa tindakan yang baik - Samada peninggalan pernyataan ini boleh diperbetulkan melalui kos tanpa keperluan untuk membuat pindaan - Penyampaian - Konvensyen Prosedur Sivil - Di mana Konvensyen Prosedur Sivil tidak wujud - Cara penyampaian.*

Dalam satu saman dalam kamar yang difailkan oleh responden dan didengar secara *ex parte* dihadapan Pendaftar, responden telah memperolehi perintah bahawa (1) responden diberi kebebasan untuk mengeluarkan notis pihak ketiga terhadap perayu (2) responden diberi kebebasan untuk menyampaikan notis pihak ketiga tersebut kepada perayu di alamat yang tertentu di New York, Amerika Syarikat melalui agen-agen responden di sana; (3) kehadiran dimasukkan dalam jangkamasa 21 hari dsb. dan (4) kos dalam kausa.

Perayu telah melalui Peguamcara tempatan membuat permohonan kepada Pendaftar untuk mengenepikan perintah yang tersebut di atas. Permohonan ini telah ditolak. Rayuan perayu kepada Hakim Yang Arif dalam Kamar ditolak. Perayu mendapat kebenaran untuk merayu ke Mahkamah Agung. Inilah rayuannya.

Diputuskan:

[1] Dalam rayuan ini, adalah diakui secara am dan diterima oleh Mahkamah, bahawa dalam negara Amerika Syarikat, tidaklah wujud Konvensyen Prosedur Sivil; oleh sebab itu Aturan 11 Kaedah 6(2) Kaedah-Kaedah Mahkamah Tinggi 1980 mestilah diikuti. Penyampaian notis writ dalam konteks ini haruslah melalui Kerajaan Amerika Syarikat atau melalui pihak Konsul Malaysia dan bukan sebagaimana telah diperintahkan oleh Mahkamah Tinggi dalam perintahnya dan dilakukan di kes ini.

[2] Perintah kebenaran untuk mengeluarkan notis pihak ketiga disahkan tetapi penyampaian luar bidangkuasa tersebut diketepikan. Oleh yang demikian, sebahagian daripada perintah Pendaftar yang membenarkan servis kepada perayu oleh agen-agen responden haruslah diketepikan.

[Kebenaran yang diberi untuk mengeluarkan notis pihak ketiga disahkan. Perintah Pendaftar yang membenarkan servis kepada Perayu oleh agen-agen responden diketepikan. Perayu diawardkan setengah daripada kos rayuan dan kos Mahkamah Tinggi.]

Cases referred to:

Kg. Kuantan Rubber Co. Ltd. v. V.K.G. Menon [1963] MLJ 332 ***(cit)***
Afro Continental Nigeria Ltd. v. Meridian Shipping Co. S.A. [1982] 2 Llyod's Rep 241 ***(foll)***
Vaudrey v. Nathan [1928] WN 154 ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 2 rr. (1), (2) O. 11 r. 1(1), (f), (j), 4, 5, 6, (2)

For the appellant - Porres Royan; M/s. Shook Lin & Bok
For the respondent - Cecil Abraham; M/s. Shearn Delamore

JUDGMENT

Peh Swee Chin SCJ:

A short procedural point arose in this case about which there seems to be a conflict of judicial opinion in the High Court. We gave our judgment and now proceed to give our reasons in writing.

The plaintiff as per its statement of claim has claimed damages for breach of contract of sale of rubber gloves allegedly bought by second defendant as agent for first defendant - a company incorporated in the United States of America (hereinafter USA), and therefore resident out of jurisdiction; (the first defendant is hereinafter called the foreign defendant, the second defendant, the local defendant).

On a summons in chambers filed by the local defendant and heard *ex parte* before the learned Registrar, the local defendant obtained an order

(1) that the local defendant be at liberty to issue a third party notice against the foreign defendant;

(2) that the local defendant be at liberty to serve the said third party notice on the foreign defendant at a specified address in New York, USA through the agents of the local defendant there;

(3) that appearance be entered within 21 days etc. and

(4) for costs in the cause.

The foreign defendant is the third party mentioned in the above action and the first defendant in this action.

The foreign defendant through local solicitors applied to the learned Registrar for the above order to be set aside. The application was refused. Against the said refusal, the foreign defendant appealed to the learned Judge in chambers who dismissed the appeal, granting leave to appeal further to us.

The relevant orders and rules of the High Court are set out below for ease of reference:

Order 11 r. 1(1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of -

(i) xxx xxx xxx xxx;

(ii) xxx xxx xxx xxx;

(iii) xxx xxx xxx xxx;

service of a notice of a writ out of jurisdiction is permissible with the leave of the Court in the following cases, that is to say -

(a) xxx xxx xxx xxx;

(b) xxx xxx xxx xxx;

(c) xxx xxx xxx xxx;

(d) xxx xxx xxx xxx;

(e) xxx xxx xxx xxx;

(f) if the action begun by writ is brought against a defendant to enforce, rescind, dissolve annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which:

(i) xxx xxx xxx xxx

(ii) xxx xxx xxx xxx

(iii) xxx xxx xxx xxx

(g) xxx xxx xxx xxx;

(h) xxx xxx xxx xxx;

(i) xxx xxx xxx xxx;

(j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;

(k) xxx xxx xxx xxx,

(l) xxx xxx xxx xxx;

Rule 4

(1) An application for the grant of leave under r. 1 or 2 must be supported by an affidavit in Form 12 stating the grounds on which the application is made and that in the deponent's belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably may be found;

(2) xxx xxx xxx xxx,

(3) xxx xxx xxx xxx

Rule 5

(1) xxx xxx xxx xxx;

(2) xxx xxx xxx xxx;

(3) xxx xxx xxx xxx

(4) xxx xxx xxx xxx

(5) An official certificate stating that a notice of writ as regards which r. 6 has been served on a person personally, or in accordance with the law of the country in which service was effected, on a specified date, being a certificate -

(a) by a consular authority in that country; or

(b) by the Government or judicial authorities of that country; or

(c) by any other authority designed in respect of that country, under the Hague Convention,

shall be evidence of the facts so stated.

(6) xxx xxx xxx xxx;

(7) xxx xxx xxx xxx;

(8) xxx xxx xxx xxx;

Order 6 r. (1)

(a) xxx xxx xxx xxx;

(b) xxx xxx xxx xxx;

Rule (2) Where in accordance with these rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the notice may be served:

(a) through the Government of that country, where the Government is willing to effect service; or

(b) through a Malaysian consular authority in that country, except where service through such an authority is contrary to the law of that country.

Before dealing with aforesaid procedural point in particular, two other issues were raised by the foreign defendant which should be briefly dealt with first.

The issue was that nowhere in the supporting affidavit for the application for leave to issue the third party notice was set out - the applicable relevant paragraphs as contained in O. 11 r. (1) set out above. It was submitted that two such paragraphs might be relevant and that they were para. (f) and para. (j) under O. 11 r. (1). In connection with para. (f), it was submitted that local defendant had not adduced evidence of how and when the contract was made, and that in regard to para. (j), it was submitted that there was no evidence of where the contract was made between the local defendant and the foreign defendant or where the foreign defendant had committed the breach. It was submitted to the effect that even paras. (j) and (f) did not apply.

While it is always far better to quote section and verse or specific order or rule in any application, it is never fatal to any application for omission to do so where the applicant can bring himself within any relevant specific order or rule. Here the local defendant could and did bring its case under paras. (f) and (j) in question. The contract was made as alleged in the statement of claim by the second defendant resident within the jurisdiction; allegedly as agent for the foreign defendant resident out of jurisdiction, and para. (f) would seem to fit comfortably, and similarly as regards para. (j), for the foreign defendant would seem in the circumstances of the case to be a necessary or proper party for third party procedure as any agent can indeed claim indemnity from his principal subject of course to proof of liability.

The second point was the failure of the local defendant to state in its affidavit supporting its application for leave to serve out of jurisdiction that in its belief, it had a good cause of action. In our view, this omission could not amount to anything more than a mere failure to comply with a rule of the High Court in regard to form and content of an affidavit, an irregularity curable by costs without any need for any amendment herein, *vide* O. 2 r. 1(1) and (2) of the Rules of the High Court. Costs to be dealt with later would be the only appropriate term to be imposed for allowing the proceeding to remain. In this connection, by virtue the said O. 2 r. (1) and (2), the case of *Kg. Kuantan Rubber Co. Ltd. v. V.K.G. Menon* [1963] MLJ 332 in so far as it decided that failure to state such belief that an applicant had a good cause of action would render an order for service out of jurisdiction invalid would now cease to be good law. It is to be borne in mind that Rules of Supreme Court 1957 applicable at the time of decision of *Kg. Kuantan* did not have a similar provision like O. 2 rr. (1) and (2) aforesaid.

Order 2 (1) and (2) is set out below:

Order 2 -

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to para. (3) the Court may, on the ground that there has been such a failure as is mentioned in para. (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

As regards the particular procedural point mentioned at the outset, it concerns the actual method of service of the notice of the writ out of jurisdiction after an order of service out of jurisdiction is granted. This is provided by O. 11 r. 6 in particular, depending on whether or not there subsists the Civil Procedure Convention in that foreign country where the service out of jurisdiction is intended to be effected. In the instant appeal, it was common ground and we accepted that in the USA, there did not subsist the Civil Procedure Convention, therefore O. 11 r. 6(2) applied. The service of the notice of writ herein would have to be through Government of the USA or through our Malaysian Consular authority contrary to what was ordered and done in this case, as stated above.

The rationale behind this prescribed method of service is of course that our Courts do not exercise their judicial powers beyond their territorial limits, and further service of judicial process in a foreign country, to use the grave words of Lord Denning in *Afro Continental Nigeria Ltd. v. Meridian Shipping Co. S.A.* [1982] 2 Lloyd's Rep. 241 is an exercise of sovereignty in that country, which can only be done with the consent of that country.

Scrutton LJ in *Vaudrey v. Nathan* [1928] WN 154 when advising circumspection in exercising power to allow service out of jurisdiction opined that in some countries service out of jurisdiction to be effected there was looked upon with great disfavour.

It is possible that the Civil Procedure Convention if held or signed in future could contain methods of service less demanding on our foreign missions than as set out in O. 11 r. 6(2), for example, even by the method of service as ordered by the learned Registrar and upheld by the learned Judge, with our present world having shrunk in these days and times and boundaries of nations consequently having been regarded with a more realistic pitch of fever.

We therefore held that the part of the learned Registrar's order providing for service on the foreign defendant by the agents of the local defendant ought to be set aside.

To sum up, we therefore upheld the leave granted to issue the third party notice herein but set aside the service out of jurisdiction in question. Since the appellant (the foreign defendant) had succeeded on one out of two of its grounds of appeal, we decided that it should be awarded half costs here and in the Court below.

Also found at [1992] 3 CLJ 1531